UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Donald T. WILCOX 534-60-4733-0-1

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2526

Donald T. WILCOX

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By an order dated 17 October 1990, an Administrative law Judge of the United States Coast Guard at Seattle, Washington revoked Appellant's Merchant Mariner's Document upon finding proved the charge and specification of violating 46 U.S.C. SS7704 by using a controlled substance, marijuana. The specification found proved alleges that Appellant, while the holder of the above-captioned document, did, on or about 15 May 1990 have marijuana metabolite present in his body as revealed through a drug screening test. Appellant submitted an answer of no contest to the charge and specification.

The Administrative Law Judge fully advised Appellant and his counsel that an answer of no contest is the same as an admission in that the Investigating Officer is relieved of the burden of proving the allegation. [TR 10-11]. Accordingly, the Administrative Law Judge found the charge and specification proved and entered an order of revocation.

Appellant testified under oath in matters of extenuation and mitigation. Appellant filed a notice of appeal on 20 November 1990 and received the transcript of the proceedings on 11 December 1990. Upon receiving a filing extension, Appellant timely filed a supporting brief on 21 February 1991. Accordingly, this matter is properly before the Commandant for disposition.

FINDINGS OF FACT

At all times relevant, Appellant was the holder the above-captioned merchant mariner's document, issued by the Coast Guard as a duplicate on 26 march 1990, authorizing him to serve as an able-bodied seaman aboard U.S. vessels. The document is endorsed for tankerman, Grade B and lower grades.

On 15 May 1990, Appellant provided a urine specimen at the Virginia Mason Occupational Medicine Clinic, Harbor Island, Seattle, Washington for a pre-employment drug screening test.

The test results revealed the presence of marijuana metabolite in Appellant's urine.

Appearance: Clifford Freed, Esq., Frank & Rosen, Suite 1200 Hope Bldg., Seattle, WA 98104

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. Appellant asserts the following bases of appeal:

1. Title 46 U.S.C. SS7704 and 46 C.F.R. SS5.59 do not require mandatory revocation in all cases of drug use;

2. The Administrative Law Judge clearly erred in not finding that Appellant's use of marijuana amounted to "experimentation" and that satisfactory evidence of "cure" had been made;

3. The Administrative Law Judge committed an abuse of discretion in failing to provide Appellant with the opportunity to obtain expert medical testimony on the issue of "cure".

OPINION

I

Appellant asserts that 46 U.S.C. SS7704 and 46 C.F.R. SS5.59 do not require mandatory revocation in all cases of drug use. Appellant urges that an order of revocation is only appropriate where the record reflects that Appellant would be a continuing threat to safety of life or property at sea. I do not agree.

It is true that revocation is an appropriate sanction for cases where Appellant constitutes such a threat. Appeal Decisions 2289 (BROWN); 2346 (WILLIAMS); 2450 (FREDERICK), affd sub nom Commandant v. Fredericks, NTSB Order No. EM-147 (1988). However, additionally, in all cases where drug possession or use or prior conviction for violating a drug law is found proved, revocation is mandatory unless an individual can provide satisfactory proof to the Administrative Law Judge that he is cured. 46 U.S.C. ÷7704; Appeal Decisions 2476 (BLAKE), aff'd. sub nom. Commandant v. Blake, NTSB Order EM-156 (1989); 2518 (HENNARD); 2459 (LORMAND); 2377 (HICKEY); 2338 (FIFER). In cases where an individual is charged with misconduct for marijuana possession, pursuant to 46 U.S.C. ÷7703, an order less than revocation may be issued where experimentation and cure are proven. 46 C.F.R. ÷5.59(a).

Here, Appellant was charged with violating 46 U.S.C. ÷7704 rather than misconduct, thus the provisions of 46 C.F.R. ÷5.59 are inapplicable. Accordingly, an order of revocation was mandatory unless Appellant submitted satisfactory evidence that he was cured of drug use.

Contrary to Appellant's assertion, the burden of establishing cure is on Appellant. Appeal Decisions 2383 (SWIERE); 2330 (STRUDWICK). The Administrative Law Judge found that Appellant had not established satisfactory evidence of cure. [TR 35, 47]. A thorough review of the record reflects no basis upon which to disturb this finding. The findings of the Administrative Law Judge will not be disturbed on review unless it can be shown that they are inherently incredible or based on insufficient evidence. Appeal Decisions 2522 (JENKINS); 2506 (SYVERSTEN); 2492 (RATH); 2378 (CALICCHIO); 2333 (AYALA); 2302 (FRAPPIER).

II

Appellant asserts that the Administrative Law Judge erred in not finding that Appellant's marijuana use amounted to "experimentation" and that he was cured of such drug use. I do not agree.

Appellant testified that he had only used marijuana twice in his life, with a span of 12 years between incidents, the latter incident caused by stress. [TR 24-27]. He testified that he was contrite for using marijuana and that he was willing to undertake any measures to prove his fitness. [TR 32]. He also testified that he had taken one subsequent drug test on 14 August 1990 which was negative for the presence of drugs. This evidence fails to establish a basis for determining cure since it does not satisfactorily demonstrate that Appellant has been successfully rehabilitated from a physical or psychological dependence on marijuana. At best, it only demonstrates that Appellant was drug free on a particular date (14 August 1990).

Appellant asserts inter alia that it was anomalous for the Administrative Law Judge to find Appellant's testimony credible yet not find that he was cured of drug use. I do not agree. Notwithstanding that Appellant's testimony was completely credible,

for the reasons stated, supra, it does not reasonably support a determination that he was cured of drug use or dependence.

As stated in Opinion I, supra, the provisions of 46 C.F.R. ÷5.59 which refers to marijuana experimentation are inapplicable to this case since Appellant was not charged with misconduct but a violation of the drug use provision of 46 U.S.C. ÷7704. Thus, although cure was a potentially relevant issue, clearly experimentation was not. Accordingly, Appellant's reference to experimentation is misplaced.

Based on the foregoing, I find the determination of the Administrative Law Judge regarding the issue of cure to be fully consonant with the evidence in the record.

III

Appellant asserts that the Administrative Law Judge committed an abuse of discretion by not granting Appellant a continuance to undergo a medical evaluation in order to prove that he was cured of drug use or dependence. I do not agree.

The decision to grant a continuance is within the exclusive discretion of the Administrative Law Judge. 46 C.F.R. ÷5.511.

The "cure" provision of 46 U.S.C. ÷7704 is unambiguous. Appellant was charged with drug use under this statute on 25 June 1990, two full months before the commencement of the hearing. He was represented by professional counsel and had ample opportunity to seek a professional medical evaluation and opinion prior to the hearing, as well as full opportunity to develop a defense based on such evaluation. Absent a showing that Appellant had already undergone such an evaluation, it was not an abuse of discretion to deny a continuance solely for this purpose, once the hearing had commenced.

If in fact, Appellant had requested a continuance in order to obtain the relevant testimony of a particular physician or other qualified professional who had already conducted an evaluation, a continuance to secure such testimony would have been reasonable. However, granting a continuance merely to permit Appellant to develop a potential defense, when such a defense could have been developed prior to the hearing, would be contrary to the interests of justice and judicial economy. 46 C.F.R. ÷5.51; Appeal Decision 2494 (PUGH).

Accordingly, I find that the Administrative Law Judge did not commit an abuse of discretion by denying the motion for a continuance.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated on 20 March 1990 at New Orleans, Louisiana is AFFIRMED.

/s/
Martin H. Daniell
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 6th day of May, 1991.

***** END OF DECISION NO. 2526 *****